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No. 03 -0159

In the
Supreme Court of the United States
October Term, 2003

SAM B. MCQUEEN,
Petitioner,
v.
SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL, OFFICE OF OCEAN & COASTAL RESOURCE MANAGEMENT (*f/k/a* SOUTH CAROLINA COASTAL COUNCIL),
Respondent.

On Petition for Writ of *Certiorari* to the Supreme Court of South Carolina

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BRIEF OF *AMICI CURIÆ* ANTHONY PALAZZOLO, NEW ENGLAND LEGAL FOUNDATION, THE AMERICAN FARM BUREAU FEDERATION, AND THE SOUTH CAROLINA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici Curiæ Anthony Palazzolo, the American Farm Bureau, and the South Carolina Farm Bureau adopt the question presented by Petitioner Sam B. McQueen:

> Whether a court may deny compensation for a categorical taking by invoking a new and expansive conception of the public trust doctrine, thereby disregarding the limits placed by this Court's regulatory takings decisions on the definition of a background principle of law.

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INTEREST OF *AMICI CURIÆ*[1]

Amici seek to bring to the Court's attention their views, and the views of the supporters the Association *Amici*—New England Legal Foundation ("NELF"), the American Farm Bureau Federation ("AFBF"), and the

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that counsel for neither Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.2 (a), counsel for *Amici* are filing this brief pursuant to a blanket consent of counsel for Petitioner and Respondent filed with this Court on August 28, 2003.

South Carolina Farm Bureau Federation ("SCFBF")—concerning the effect of the public trust doctrine as a background principle of state law on the takings clause under the Fifth and Fourteenth Amendments to the United States Constitution.

Amicus Curiæ Anthony Palazzolo ("Palazzolo") owns approximately 18 acres of wetland property, subdivided into 74 building lots, in Westerly, Rhode Island. Rhode Island state coastal wetlands regulations similar to those at issue in this case have severely restricted Mr. Palazzolo's use of his property. Mr. Palazzolo challenged these Rhode Island wetlands regulations as a regulatory taking in litigation that reached this Court in *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001). This Court determined that the so-called "notice rule" should not bar Mr. Palazzolo's regulatory taking claim and remanded Mr. Palazzolo's case to the Rhode Island Supreme Court for further proceedings to address the merits of his claims under *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978). 533 U.S. at 627–28, 630, 632. Shortly thereafter, this Court granted the initial petition for *certiorari* by Petitioner Sam B. McQueen ("McQueen") and remanded this case to the Supreme Court of South Carolina for further consideration in light of *Palazzolo. McQueen v. South Carolina Department of Health & Envtl. Control,* 533 U.S. 943 (2001), *vacating McQueen v. South Carolina Coastal Council,* 340 S.C. 65, 530 S.E.2d 628 (2000) ("*McQueen I*") (barring McQueen's regulatory takings claim on basis of notice rule).

Just as the South Carolina Supreme Court did in this case, on remand in Mr. Palazzolo's case the Rhode Island Supreme Court ordered the parties to address the applicability of the public trust doctrine to the wetlands at issue, *Palazzolo v. State ex rel. Tavares,* 785 A.2d 561 (R.I. 2001). The Rhode Island Supreme Court in an unpublished order then further remanded Mr. Palazzolo's

case to the Rhode Island Superior Court for Washington County for re-trial. *Palazzolo v. State ex rel. Tavares*, No. 98-333-A, order (R.I. June 24, 2002).[2] The Rhode Island Supreme Court's remand order mandated that the trial court "consider . . . the effect of the Public Trust Doctrine . . . on [Mr. Palazzolo's] reasonable investment-backed expectations [under the doctrine of *Penn Central*]"; "require that a complete survey of the *Palazzolo* property be filed with the Court prior to any hearing [in order to] establish, among other elements, the portion of the *Palazzolo* marshlands that are below the high-water mark of tidal effect [the historic public trust boundary]"; and "consider the effect of the Public Trust Doctrine upon the limitations of title originally acquired by Mr. Palazzolo and his predecessor in title, Shore Gardens, Inc., in accordance with the [background] principles [of state law] enunciated in *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)]." *Id.* Mr. Palazzolo is concerned that, unless the South Carolina Supreme Court's novel public trust position is reversed, the Rhode Island state courts may similarly deny him compensation based on a re-interpretation of public trust law that he could not have foreseen when he invested in his property in 1959.

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF's members are affected by

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2 The Rhode Island Supreme Court's remand order is attached hereto as Appendix A.

the real estate development climate in New England, which depends, in part, upon the extent to which land-use agencies respect property owners' development expectations. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Green Tree Fin. Corp. v. Bazzle,* 123 S. Ct. 2402 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster,* 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.,* 230 F.3d 439 (1st Cir. 2000), *cert. denied,* 532 U.S. 1048 (2001). NELF has submitted briefs, as party or counsel, in several cases involving the public trust doctrine to state supreme courts. *See, e.g., Trio Algarvio, Inc. v. Department of Envtl. Protection,* 440 Mass. 94, __ N.E.2d __ (2003); *Providence & Worcester R.R. v. Pine,* 729 A.2d 202 (R.I. 1999); and *Greater Providence Chamber of Commerce v. State of Rhode Island,* 657 A.2d 1038 (R.I. 1995).

Amicus Curiæ AFBF is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, educational and social interests of American farmers and ranchers. It has member organizations in all 50 states and Puerto Rico representing more that 5 million member families.

Amicus Curiæ SCFBF is a voluntary non-profit membership association organized under the laws of the State of South Carolina. It has its principal offices in Columbia, South Carolina. SCFBF, individually and through joint and collective efforts, seeks to promote, protect and represent the economic, social and educational interests of farmers in South Carolina. SCFBF is composed of 47 local chapters with a total membership of more than 130,000 member families. SCFBF is a member of the AFBF.

Sam B. McQueen is a farmer member of the Horry-Conway Chapter of SCFBF. Horry-Conway Farm Bureau represents 3,801 member families.

AFBF and SCFBF farmer and rancher members own or lease significant amounts of land on which they depend for their livelihoods and on which all Americans depend for high quality, affordable food, fiber and other basic necessities. Because that land is subject to increasingly onerous regulation from all levels of government—such as the state wetlands regulation at issue in this case—AFBF and SCFBF members are vitally interested in the legal rules establishing the availability of compensation under the Takings Clause of the Fifth Amendment when regulation goes too far. AFBF and SCFBF and their members have a direct interest in the outcome of this case and, therefore, are vitally interested in the proper interpretation of the Just Compensation Clause of the Fifth Amendment to the United States Constitution. These concerns underlie AFBF's participation as an *amicus* in this Court in support of landowners in takings cases such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), as

well as in cases concerning the permissible scope of federal land use regulation such as *Babbit v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

The South Carolina Supreme Court's expansion of the circumstances in which a state may effectively dispossess an owner of his or her property without paying compensation is therefore contrary to the interests of *Amici* and the members of the Association *Amici*. *Amici Curiæ* therefore believe that this brief will provide an additional perspective to aid the Court in determining whether to grant the petition for a writ of *certiorari* of Petitioner McQueen.

SUMMARY OF ARGUMENT

The decision below in this case violates procedural standards by ignoring the mandate of this Court on remand, by basing its ruling on a defense that was not presented to the trial court, and by resting on factual assumptions not found in the record. The decision below also expands traditional South Carolina public trust doctrine beyond its traditional confines, contrary long-adhered to background principles of state law, by allowing its use for purposes other than navigation, by applying the doctrine to wetlands above the mean high tide line, and by applying the doctrine to private property inundated by a single catastrophic event, Hurricane Hugo.

ARGUMENT

I. The decision below constitutes an attempted evasion of federal law because the South Carolina Supreme Court engaged in several procedural irregularities in order to reach its result-oriented conclusion.

This case raises a matter of national concern that affects owners of wetland property throughout the country: the extent to which the federal Constitution protects property owners when states reformulate their traditional public trust doctrine to cover additional land, for additional purposes, with additional use restrictions. This Court should therefore grant *certiorari* in this case pursuant to Supreme Court Rule 10 (c) because the South Carolina Supreme Court has "decided an important federal question in a way that conflicts with relevant decisions of this Court," including this Court's previous remand order in this case, *McQueen v. South Carolina Department of Health & Envtl. Control,* 533 U.S. 943 (2001), and this Court's jurisprudence defining background principles of state law in *Palazzolo v. Rhode Island,* 533 U.S. 606, 630 (2001), and *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029 (1992).

Since *Lucas,* states have increasingly relied on background legal principles, in particular the public trust doctrine, as defenses to regulatory takings. This case squarely addresses how much beyond long-standing precedents a state can stretch its traditional common law in order to defeat federally protected property rights by invoking "background principles of state law." The South Carolina Supreme Court's expansion of the public trust beyond its precedential moorings in this case goes too far. As this Court has instructed, "at least as to confiscatory regulations (as opposed to those regulating

the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 167 (1998). The South Carolina Supreme Court's considerable departures from procedural and substantive precedents illustrate the degree to which it was willing to go in abrogating traditional legal principles to deprive McQueen of compensation for what the court acknowledged was "a total taking." *McQueen v. South Carolina Coastal Council,* 354 S.C. 142, 148, 580 S.E.2d 116, 119 (2003) ("*McQueen II*").

Amici contend that the South Carolina Supreme Court arrived at the decision on remand based on at least three significant procedural irregularities that alone warrant examination of the decision by this Court as an attempt to evade federal takings law. First, as discussed in detail by Petitioner, the court below ignored this Court's mandate and failed to address the effect of the *Palazzolo* decision on its earlier decision in *McQueen I, vacated and remanded sub nom. McQueen v. South Carolina Dept. of Health & Envtl. Control,* 533 U.S. 943 (2001). *See* Petition at 9–11. Most striking in this case is the South Carolina Supreme Court's rejection of compensation for McQueen on the basis of the public trust doctrine as a purported background principle of state law without reviewing the extensive discussion in *Palazzolo* of the meaning of background principles of state law. *Compare McQueen II,* 354 S.C. at 148–49, 580 S.E.2d at 119, *with Palazzolo,* 533 U.S. at 626, 629–30. *See* 18B Charles Alan Wright *et al., Federal Practice & Procedure* § 4478.3 (2003) (lower court "does violate the mandate . . . [if it] fail[s] to decide questions that the court of appeals has directed the lower court to decide").

The second significant procedural irregularity is that the public trust doctrine—the basis of the South

Carolina Supreme Court's decision on remand—was an issue newly introduced to the case, *and rejected on that ground,* when the South Carolina Supreme Court first considered McQueen's case. *McQueen I,* 340 S.C. at 70 n.2, 530 S.E.2d at 631 n.2. The administrative decisions to deny McQueen the use of his property were based on state wetlands regulations and did not take the public trust into account. *Id.*, 340 S.C. at 68, 530 S.E.2d at 630 (property located within "tidelands critical area").

At the trial level, the State did not raise the public trust as a defense to the regulatory taking and the trial court therefore did not make any factual determination about the extent of McQueen's property that was encumbered by the public trust. *See* Petition Appendix E at 41a–54a. The South Carolina Supreme Court, in its first opinion, dismissed public trust arguments made by *amici* "[b]ecause these arguments were not made to the lower courts . . . ." *McQueen I,* 340 S.C. at 70 n.2, 530 S.E.2d at 631 n.2. The South Carolina Supreme Court initially decided to deny McQueen compensation for the regulatory prohibition on using his property on the "notice rule" because McQueen did not request development permission earlier in the face of growing regulatory restrictions. *McQueen I,* 340 S.C. at 73–76, 530 S.E.2d at 633–35.

Nevertheless, on remand from this Court for consideration in light of *Palazzolo,* the South Carolina Supreme Court framed the issue as "Do background principles within South Carolina property law absolve the State from compensating McQueen?" *McQueen II,* 354 S.C. at 148, 580 S.E.2d at 119. The only background principle that the South Carolina Supreme Court considered was the public trust doctrine, *id.*, 354 S.C. at 149–50, 580 S.E.2d at 119–20, despite the court's earlier rejection of the doctrine for the State's failure to raise it below. The South Carolina Supreme Court's raising of the

public trust doctrine as a defense *ex mero motu* despite the failure of the State to raise it below flies in the face of long-standing rules of procedure. *Grant v. South Carolina Coastal Council,* 319 S.C. 348, 356, 461 S.E.2d 388, 392 (1995) (appellate court will not hear issues not raised or preserved in lower court proceeding); *Lite House, Inc. v. J.C. Roy Co.,* 309 S.C. 50, 55, 419 S.E.2d 817, 820 (Ct. App. 1992) ("Because the trial judge did not address the issue . . . and [the party raising the issue] made no motion asking him to do so . . ., we also will not address this issue."). *See* Petition at 17 n.11.

The third major procedural irregularity is that the South Carolina Supreme Court based its decision to deny McQueen compensation on the public trust doctrine without any findings of fact below that McQueen's property was subject to the public trust. On remand, the court below relied on the following statements, apparently derived from the administrative record, to find that the public trust applied to McQueen's land:

> At the time of the hearing, the majority of both lots had reverted to tidelands *or* critical area saltwater wetlands. . . . The 53rd Avenue lot is inundated regularly by tidal flow all the way up to the street. The 48th Avenue lot has less tidal flow but contains more critical area wetland vegetation.

McQueen II, 354 S.C. at 146, 580 S.E.2d at 118 (emphasis added).[3] These determinations relate to the

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3 South Carolina statute defines "tidelands" to include not only land below mean high tide, but also considerable property above mean high tide: all "coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved," regardless of the effect of the tide. S.C. St. § 48-39-10 (G). As used in current South Carolina coastal regulations, "tidal" land includes not only property subject to

administrative jurisdiction of the regulatory agency. None of these purported factual determinations relate to the critical determination for public trust purposes of the extent of inundation of McQueen's property at mean high tide. *State v. Fain,* 273 S.C. 748, 752, 259 S.E.2d 606, 608 (1979); *State v. Hardee,* 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972). In fact, quite the opposite, as it appears that the 48th Avenue lot is not significantly affected by the tide.

Not surprisingly, because the public trust was not an issue at the trial court, the extent of the public trust was not tried and did not become a part of the record and the trial court made no fact findings on the extent of the public trust. *See* Petition Appendix E at 41a–54a. Moreover, even the South Carolina Supreme Court could have done so as an equitable matter, it did not attempt to make findings from the sparse record as to the extent of McQueen's property covered at mean high tide. *See South Carolina Department of Natural Resources v. Town of McClellanville,* 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) ("[A] Master's findings, concurred with by the circuit court, will not be disturbed on appeal unless without evidentiary support."); *Satcher v. Satcher,* 351 S.C. 477, 482, 570 S.E.2d 535, 538 (Ct. App. 2002) (in a South Carolina equity action heard by a master, while appellate court may make findings of fact from the record, "we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was

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tidal inundation at mean high tide, but all adjacent wetlands that "are an integral part of the estuarine systems." S.C. Dept. of Health & Envtl. Control, R-30-1 (D) (49), available at http://www.scdhec.gov/ocrm/HTML/regs2002.html. Therefore the reference to much of the lots as "tideland" is irrelevant to determining the extent of the public trust. Similarly, the reference to the 53rd Avenue lot as "inundated regularly by tidal flow all the way up to the street" is irrelevant because regular may mean only at the twice monthly extremely high spring high tides.

in a better position to judge their credibility."); *Low Country Open Land Trust v. State,* 347 S.C. 96, 101–02, 552 S.E.2d 778, 781 (Ct. App. 2001) (determination of title in tidelands is a legal matter, appellate courts defer to master as factfinder).

McQueen had no notice that he might need to introduce evidence of the inapplicability of the public trust to his property. Had he been apprised that the State was raising a public trust defense, under South Carolina law, he could have attempted to put forward evidence that his title extended below been high water by virtue of the original grant. *See Hardee,* 259 S.C. at 539, 193 S.E.2d at 499 ("in the absence of more specific language," private title presumed to extend only to mean high tide line); *Low Country Open Land Trust,* 347 S.C. at 102–03, 552 S.E.2d at 782–83 (property owner overcame presumption to establish title below mean high tide).[4]

McQueen had no opportunity to rebut the presumptions of title to land below mean high tide and to navigability of the canal because they were not issues in the case until the South Carolina Supreme Court made them issues on remand from this Court. Until then, McQueen was in the same position as the owner of the Atlantic House, "where it was uncontested [that the property owner] was 'owner of record' of land below high water mark." *McQueen II,* 354 S.C. at 149 n.6, 580 S.E.2d at 119 n.6, *citing City of Folly Beach v. Atlantic House Properties, Inc.,* 318 S.C. 450, 458 S.E.2d 426 (1995). Nevertheless, the South Carolina Supreme Court applied

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4 It might well be that the prior owners of the subdivision in which McQueen's lots are located may have owned the entire property, including the canal beds, in fee. It may well be that the tidal canal abutting McQueen's property was not navigable in fact, which would have exempted it from the public trust under South Carolina law. *See McQueen II,* 354 S.C. at 150 n.7, 580 at 120 n.7; *Hughes v. Nelson,* 303 S.C. 102, 104, 399 S.E.2d 24, 25 (Ct. App. 1990).

the presumptions of title and navigability against McQueen on remand.

In view of the procedural irregularities in the opinion below—which ignores this Court's mandate, is based on an issue not raised below, and relies on facts not in evidence—the South Carolina Supreme Court's decision is severely flawed. It therefore well warrants review by this Court to vindicate McQueen's federally protected property rights.

II. The South Carolina Supreme Court's significant expansion of the public trust doctrine invites review because the court's novel substantive interpretation of the public trust doctrine contradicts traditional South Carolina public trust limitations.

Not only is the decision below procedurally flawed, it also effects a major change in South Carolina property law by expanding the public trust in three significant ways—ignoring the traditional limitation on the public trust of the doctrine of avulsion, expanding public trust coverage to marshland above mean high tide, and expanding permissible public trust purposes in artificial navigable streams beyond navigation. This constitutes a perversion of this Court's guidance on the meaning of background principles of state law in *Palazzolo* and *Lucas*. For the State to prohibit a proposed development as a violation of a background principle, the principle must be generally applicable, long-standing, and based on the state's common-law tradition.[5] In this case, all

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[5] "It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law *by mere virtue of the passage of title*. . . . [O]ur description of the concept in *Lucas* . . . is explained in terms of those *common, shared* understandings of permissible limitations derived from a State's legal *tradition*." *Palazzolo v. Rhode Island*, 533 U.S. at 630 (emphasis added). "Any limitation so severe

three of these expansions of the public trust are major departures from historic precedents.[6]

Historically, the rapid inundation of property by tidal waters is treated as an avulsion (a sudden change in a water body's limits), meaning that property boundaries remain the same as before the change. By common law, the property owner may reclaim such inundated land. "If

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cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029 (emphasis added). The decision below, if allowed to stand, would effectively permit states to change their public trust doctrines retroactively to prohibit the use of property coveted by the government in its natural condition without compensation and without allowing a federal remedy. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998) (O'Connor, J., plurality opinion) (retroactive application of novel legal doctrines discouraged).

6 South Carolina could not argue that the South Carolina Supreme Court's novel expansive interpretation of the public trust doctrine was permissible as an adequate and independent state ground for decision, even if fails to meet the requirements of a background principle of state law under *Lucas* and *Palazzolo*. This Court has held on numerous occasions that a ruling that purports to rest on an adequate and independent state ground invites review when the state decision has the effect of evading a federal right. *Howlett by Howlett v. Rose*, 496 U.S. 356, 366 (1990) ("The adequacy of the state law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review de novo."). *See* 16B Charles Alan Wright *et al., Federal Practice & Procedure* § 4021 at 299, § 4029 (federal courts may "disregard . . . any state ground that has so little support in either reason or precedent as to be 'in effect' an evasion of federal law") (1996 & Supp. 2003). In this case McQueen's property rights are protected by the Due Process and Takings Clauses of the Fifth Amendment of the federal Constitution, as applied to the states by the Fourteenth Amendment. The numerous procedural irregularities and departures from precedent discussed by *Amici* suggest that the South Carolina Supreme Court in *McQueen II* was attempting to evade the recognition of McQueen's federally protected property rights.

a subject hath land adjoining the sea, and the violence of the sea swallow it up . . . if . . . it be by art or industry regained, the subject does not lose his propriety . . . though the inundation continue forty years." Matthew Hale, *De Jure Maris*, c. 4 at 381. *See id.* at c. 4 at 383; Joseph K. Angell, *Treatise on the Right of Property in Tide Waters* 76–79 (1826) ("[I]f an individual's land has been inundated, he may regain it by any work which will shut out and exclude the water.").[7] South Carolina recognizes the doctrine of avulsion, at least in regard to shifting stream beds. *Spigener v. Cooner*, 42 S.C.L. (8 Rich.) 301 (1855). Moreover, "the English common law ordinarily is presumed to govern if there is no South Carolina authority to the contrary." *State ex rel. McLeod v. Sloan Constr. Co.*, 284 S.C. 491, 496, 328 S.E.2d 84, 87 (Ct. App. 1985) (citation omitted). *See Low Country Open Land Trust v. State*, 347 S.C. at 109–10, 552 S.E.2d at 785–86.

The record on appeal ("R.") below discloses that McQueen's property suffered little erosion until Hurricane Hugo in 1989 and, during that hurricane, the property eroded significantly. R. at 117, 212–13, 335. This is a classic case for the application of the doctrine of avulsion, which would have allowed McQueen to use "art or industry" to reclaim the land lost to the hurricane, in accordance with applicable English common law and South Carolina precedents. Thus, this case is similar to *City of Folly Beach*, where a restaurant built over the ocean was destroyed by Hurricane Hugo and the owners were entitled to compensation for the taking of their

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7 Numerous South Carolina cases cite Hale and Angell as authorities on the public trust. *See, e.g., Spigener v. Cooner*, 42 S.C.L. (8 Rich.) 301 (1855); *Shands v. Triplet*, 26 S.C. Eq. (5 Rich. Eq.) 76 (1852); *Horry County v. Woodward*, 282 S. C. 366, 372–74, 318 S.E.2d 584, 587–89 (Ct. App. 1984) (quoting same portion of Hale with different omissions); *State ex rel. McLeod v. Sloan Constr. Co.*, 284 S.C. 491, 496, 328 S.E.2d 84, 86–87(Ct. App. 1985).

property by eminent domain because they had the right to rebuild. *City of Folly Beach*, 318 S.C. at 451, 458 S.E.2d at 426, *cited in McQueen II*, 354 S.C. at 149 n.6, 150 n.8, 580 S.E.2d at 119 n.6, 120 n.8. Nevertheless, the South Carolina Supreme Court in this case chose to disregard avulsion as a qualification of the public trust doctrine and its own recent precedent in *City of Folly Beach* to deny McQueen compensation.

In another departure from traditional public trust doctrine, the South Carolina Supreme Court blithely applied the public trust to property above the mean high tide line that falls within the statutory jurisdiction of the Department of Health and Environmental Control because it is wetland and therefore meets the expansive statutory definition of "tideland." *See supra* note 3. "[W]etlands created by the encroachment of navigable tidal water belong to the State." *McQueen II*, 354 S.C. at 150, 580 S.E.2d at 120.[8] This proposition, which confounds wetlands and tidelands, constitutes an unprecedented expansion of the public trust, which historically applied in South Carolina (as in most states) to coastal property only below the mean high tide line. *Hardee*, 259 S.C. at 540–41, 193 S.E.2d at 500. *See Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (while public trust doctrine is unique in each state, broad outlines of public trust doctrine similar in all states). Much, if not most, coastal wetland property is above the mean high tide line. While wetlands above the mean high tide line

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8 The case cited by the South Carolina Supreme Court as precedent for expanding the public trust to all coastal wetlands, *McQueen II*, 354 S.C. at 150, 580 S.E.2d at 120, does not support the proposition. The earlier case stated: "The extended marsh created by encroachment of the waters . . . also belongs to the State." *Coburg Dairy, Inc. v. Lesser*, 318 S.C. 510, 513, 458 S.E.2d 547, 548 (1995). In the original context, however, it is clear that all the marshland referred to in *Coburg* was below the mean high tide line, unlike that in McQueen's case.

are of environmental concern and subject to reasonable land-use regulation, until now they have always been treated as private property free of the public trust.

In its third expansion of South Carolina public trust doctrine, the South Carolina Supreme Court used the public trust to prohibit development of property that has no navigational utility, despite precedents that navigation is the principal recognized public trust purpose in South Carolina. *City of Folly Beach*, 318 S.C. at 452, 458 S.E.2d at 427. *See Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 127–28, 456 S.E.2d 397, 402 (1995) (reciting novel public trust uses such as recreating on the high seas). Even if McQueen's property is subject to the public trust by virtue of bordering on an artificial waterway, the state cannot simply mention the public trust and then completely eviscerate McQueen's property rights without a significant public trust purpose. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). This constitutes a perversion of the public trust doctrine into an anti-growth tool, when its historical intent was to maximize efficient *use* of a significant resource. *See* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 254 (1992). *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 647 (1986).

The South Carolina Supreme Court cannot break with long-established precedents regarding the limitations, scope, and purposes of the public trust doctrine in a result-oriented decision to prevent McQueen from receiving compensation for the State's regulations which prohibit development of his property. With its disregard of procedural and substantive precedents, the decision below attempts to evade federal review South Carolina's abolition of McQueen's property rights

protected by the federal Constitution's Fifth and Fourteenth Amendments.

CONCLUSION

For the reasons stated above, this Court should grant McQueen's petition for a writ of *certiorari*.

Respectfully submitted,

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AMERICAN FARM BUREAU FEDERATION, and
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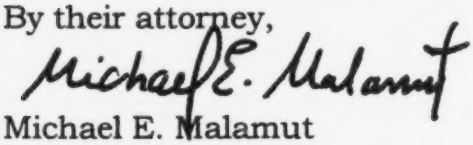
By their attorney,



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Dated: September 29, 2003

APPENDIX A

Rhode Island Supreme Court

No. 98-333-Appeal.

Anthony Palazzolo

v.

State of Rhode Island, by and through its General Treasurer, Paul J. Tavares, et al.

Order

This case came before the Supreme Court in conference by virtue of a remand order from the Supreme Court of the United States *sub nom. Palazzolo v. Rhode Island, et al.*, 533 U.S. 606 (2001), 121 S.Ct. 2448, 150 L. Ed.2d. 592. On receipt of the Order of Remand from the Supreme Court of the United States, this Court requested counsel to file memoranda concerning the issues to be submitted to the Superior Court for purposes of conducting a trial of this case on remand. Pursuant to this directive, counsel for the parties and *amicus* counsel have filed memoranda, the most recent of which was filed in June 2002. After considering the memoranda and carefully analyzing the mandate of the Supreme Court of the United States, we hereby remand this case to the Presiding Justice of the Superior Court for an assignment to a trial justice in accordance with the following guidelines:

1. The trial justice will take all necessary evidence in order to determine the claim of Anthony Palazzolo for monetary damages against the State of Rhode Island for an alleged regulatory taking of his property by analyzing his reasonable investment-backed expectations in accordance with the principles enunciated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

2. In conducting this analysis, the trial justice should consider *inter alia* the effect of the Public Trust Doctrine as enunciated in *Greater Providence Chamber of Commerce,* et al. *v. Rhode Island,* 657 A.2d 1038 (R.I. 1995), on such reasonable investment-backed expectations.

3. The trial justice shall require that a complete survey of the *Palazzolo* property be filed with the Court prior to any hearing. This survey should establish, among other elements, the portion of the *Palazzolo* marshlands that are below the high-water mark of tidal effect.

4. The trial justice should consider the effect of the Public Trust Doctrine upon the limitations of title originally acquired by Mr. Palazzolo and his predecessor in title, Shore Gardens, Inc., in accordance with the principles enunciated in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Attention should be given to the doctrine as enunciated in *Shively v. Bowlby,* 152 U.S. 1, 57, 14 S.Ct.548, 569, 38 L.Ed. 331, 352 (1894).

5. The trial justice should also consider the effect, if any, of the doctrines of public and private nuisance upon Mr. Palazzolo's reasonable investment-backed expectations.

6. In the event that the trial justice should find that a regulatory taking of the *Palazzolo* land has occurred, he should then make appropriate findings regarding the measure of damages, if any, for such taking.

7. The trial justice shall make all necessary findings of fact and conclusions of law and thereupon render a judgment that will respond to all issues appropriately raised by the parties, including, but not limited to, the

issues set forth in the guidelines enunciated in this Order.

8. Either party who may be aggrieved by this judgment may appeal to this Court.

Chief Justice Weisberger (Ret.) participated in the deliberations relative to this Order.

Chief Justice Williams did not participate.

Entered as an order of this Court on this 24th day of June, 2002.

By Order,

s/Brian B. Burns

Clerk